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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, AND JOSEPH G. O'BRIEN,

Appellants,

vs.

EDMUND ORBECK, COMMISSIONER OF THE DEPARTMENT OF LABOR OF THE STATE OF ALASKA and GUY RICHARD MARTIN, COMMISSIONER OF THE DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF ALASKA,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA.

BRIEF OF PEABODY TESTING—BILL MILLER X-RAY, INC., AMICUS CURIAE (FOR APPELLANTS)

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BRIEF OF PEABODY TESTING—BILL MILLER X-RAY, INC., AMICUS CURIAE (FOR APPELLANTS)

QUESTION PRESENTED.

May Alaska require private employers involved in any oil and gas activities resulting from leases with the state to first hire and last fire Alaska residents in preference to residents of other states?

STATUTE INVOLVED.

The "Local Hire Under State Leases Act" ("Alaska Hire"), AS 38.40, provides, in relevant part, as follows:

> "Sec. 38.40.030. *Resident hire.* (a) In order to create, protect and preserve the right of Alaska residents to employment, the Commissioner of Natural Resources shall incorporate into all oil or gas leases, easements or right-of-way permits for oil or gas line purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party, provisions requiring the lessee to comply with applicable laws and regulations with regard to the employment of Alaska residents, a provision requiring the employment of qualified Alaska residents, a provision prohibiting discrimination against Alaska residents and when in the determination of the Commissioner of Natural Resources it is practicable, a provision requiring compliance with the Alaska Plan, all in accordance with the provisions of this chapter."

The regulations promulgated pursuant to the Alaska Hire law 8 AAC 35, provide, in relevant part, as follows:

> "8 AAC 35.011. REDUCTION OF WORK FORCE. (a) When either a resident employee or a non-resident employee, working in the same trade or craft, is to be laid off, the non-resident may be retained only if no resident employee is qualified to fill the position."
>
> * * * * *
>
> "8 AAC 35.042. DISCRIMINATION AGAINST ALASKA RESIDENTS. The following discriminatory practices by an employer subject to the act against Alaska residents who are employed or seeking employment on a project are prohibited:
>
> (1) hiring non-residents when residents are known to be available, willing and qualified for employment;
>
> (2) rejection of a resident referred to an employer by a collective bargaining agent in favor of a non-resident of similar qualifications in employment covered by a collective bargaining agreement;

> (3) rejection of a resident in favor of a non-resident of similar qualifications in employment not covered by a collective bargaining agreement;
>
> (4) termination of a resident in favor of a non-resident of similar qualifications;
>
> . . . ."

INTEREST OF AMICUS CURIAE.

Peabody Testing—Bill Miller X-Ray, Inc. ("Peabody-Miller") is a joint venture comprised of Bill Miller X-Ray, Inc., an Oklahoma corporation, and X-Ray Engineering Company, a California corporation. Under contract with Alyeska Pipeline Service Company ("Alyeska"), a right-of-way lessee of the State of Alaska, Peabody-Miller performed non-destructive inspection work on the Trans-Alaska Pipeline and related facilities.

Peabody-Miller's special interest in the issue presented in this case arises from the fact that it is presently being prosecuted by the State of Alaska for alleged violation of the Alaska Hire law and the regulations promulgated thereunder. The State's action arises out of 18 separate complaints filed by persons claiming to be Alaska residents who allege that they were denied employment with Peabody-Miller at a time when Peabody-Miller employed non-residents. These complaints became the subject of hearings before the Department of Labor of the State of Alaska which, though adjourned, have not been closed. Since adjournment, the State has moved for the production of considerable additional evidence. Peabody-Miller has incurred and will likely incur substantial litigation expenses as a result of these proceedings. Moreover, the State has indicated it is seeking damages for each complainant equal to three times the wages he or she would have earned working for Peabody-Miller plus any additional damages or expenses incurred as a result of the failure to hire. AS 38.40.070(a).

All parties have consented to the filing of a brief *amicus curiae* by Peabody-Miller.

ARGUMENT.

I.

THE ALASKA HIRE LAW VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE IV, § 2.

By compelling private employers to discriminate in employment against non-Alaska residents of United States citizenry, the Alaska Hire law violates the constitutional mandate set forth in Article IV, § 2 that "[t]he citizens of each State shall be entitled to all privileges of immunities of citizens in the several States."[1]

In rejecting this contention, the majority of the court below erroneously relied on the "natural resources exception" or "ownership" rationale of *McCready* v. *Virginia*, 94 U. S. 391 (1877), to the effect that a state's proprietary, or "ownership" interest in tangible natural resources within its territories allows it to limit the right to deplete them to its own residents.[2] Though the statute in issue here does not regulate the extraction of a State owned resource but rather employment related to the construction of a resource distribution system, the court below concluded that the *McCready* principle still applied since the State had a "contractual nexus" to the construction of the pipeline.[3]

1. Concededly, unlike Appellants, Peabody-Miller lacks the protection afforded by the privileges and immunities clause since it is a corporate entity and not a "citizen". *Hague* v. *C. I. O.*, 307 U. S. 496, 59 S. Ct. 954 (1939); *Grossjean* v. *American Press Co.*, 297 U. S. 233, 56 S. Ct. 444 (1936).

2. *Hicklin* v. *Orbeck*, 565 P. 2d 159 (Alaska, 1977).

3. There is some question whether the "contractual nexus" ever really materialized. See footnote 6, *infra*.

While relying on *McCready*, the Alaska Supreme Court was compelled to acknowledge that its rationale had been weakened and distinguished over the years, most significantly by *Toomer* v. *Witsell*, 334 U. S. 385, 402, 68 S. Ct. 1156 (1948). Whatever limited life *McCready* had[4] was finally obliterated by *Douglas* v. *Seacoast Products, Inc.*, ... U. S. ....., 97 S. Ct. 1740 (May 23, 1977) where, primarily on the basis of federal preemption, this Court struck down a Virginia law prohibiting non-resident fishing in Chesapeake Bay. In rejecting the "ownership" argument advanced by the state, this Court stated:

> ". . . . The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' [Citing, *inter alia, Toomer*] Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution. . . ."[5]

4. The dissenting opinion below cogently argued that *Toomer* in effect "cast . . . serious doubt on the continued authority of *McCready*". *See also Mullaney* v. *Anderson*, 342 U. S. 415, 72 S. Ct. 428 (1952) (striking down on the basis of *Toomer* a law of the Territory of Alaska); *Missouri* v. *Holland*, 252 U. S. 416, 434, 40 S. Ct. 382 (1920); and *Brown* v. *Anderson*, 202 F. Supp. 96, 102 (D. Alaska, 1962), where a three-judge panel pronounced ". . . Defendants say McCready is good law. The ownership theory was put at rest, however, in Toomer v. Witsell. . . ."

5. In *Heim* v. *McCall*, 239 U. S. 175, 36 S. Ct. 78 (1915) and *Crane* v. *New York*, 239 U. S. 195, 36 S. Ct. 85 (1915), a *McCready*-type concept served to uphold the constitutionality of a New York statute requiring that citizens of the State be given employment preference on state public works projects.

Like *McCready*, the "*Heim-Crane*" doctrine has been eroded over the years. *See Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, 68 S. Ct. 1138 (1948); *Graham* v. *Richardson*, 403 U. S. 365, 91 S. Ct. 1848 (1971); *Sugarman* v. *Dougall*, 413 U. S. 634, 93 S. Ct. 2842 (1973). Finally, in *Lefkowitz* v. *C. D. R. Enterprises, Ltd.* ..... U. S. ....., 97 S. Ct. 721 (1977), this Court affirmed a federal district court decision striking down a New York

(Footnote continued on next page.)

Significantly, the court below appeared to acknowledge that, absent the *McCready* "ownership" exception, the Alaska Hire act cannot pass constitutional muster. Thus, the court took pains to reject the trial judge's attempts to find other independent state justifications for the legislation such as would meet the tests enunciated in *Toomer*. Indeed, the court characterized Alaska Hire as "economic protectionism for its own sake". In a previous case, the same court had expressly rejected this as a legitimate basis for discrimination:

> "Benefiting economic interests of residents over nonresidents is not a purpose which may constitutionally vindicate discriminatory legislation." *Lynden Transport, Inc.* v. *Alaska,* 532 P. 2d 700, 711 (Alaska, 1975).

Moreover, in the decision below the court practically conceded that, absent ownership, economic protectionism or, more euphemistically, "an attempt to strengthen the Alaskan economy" is not a sufficient basis for discrimination:

> "The natural resources of Alaska 'belong' to Alaska and Alaskans in a way that, in our federal system, Alaska's society and economy in general do not."

Given the now complete discrediting of the *McCready* natural resource exception, the lower court's distinction and rationale are simply not viable.

Resurrection of the *McCready* "ownership" theory would be particularly anachronistic in the context of this case. The vast majority of land over which the pipeline extends is federally owned; it traverses state land only at certain points along its

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statute virtually indistinguishable from that involved in *Heim* and *Crane,* in which the court had concluded:

> ". . . *Crane* and *Heim* are not simply moribund; we believe they are dead. Otherwise the results in *Graham* and *Dougall* could not have been reached." *C. D. R. Enterprises, Ltd.* v. *Board of Education,* 412 F. Supp. 1164, 1170 (E. D. N. Y. 1976).

length.[6] The project is privately funded. From its inception it was intended to serve the vital, congressionally recognized national interest created by critical shortages of domestic oil.[7] This statute thus seeks to exclude United States citizens from private employment in the construction of a distribution system on federal land serving vital national interests. Whatever the viability of the *McCready* doctrine, the proprietary interests of the State are hardly sufficient to justify blatant discrimination against United States citizens in this context.

II.

THE ALASKA HIRE LAW CONSTITUTES AN INVASION BY STATE LAW INTO AN AREA RESERVED TO FEDERAL SUBSTANTIVE LAW AND POLICY UNDER THE NATIONAL LABOR RELATIONS ACT AND THEREFORE VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI.

Like almost every other private employer performing work on the pipeline project, Peabody-Miller is party to a collective bargaining agreement with a labor organization as the duly

6. *See* Alleyne, "Constitutional Restraints on the Preferential Hiring of Alaskan Residents for Oil Pipeline Construction", 2 *U. C. L. A.—Alaska L. Rev.,* 1, n. 20 (1972), in which the consultant to the Joint Pipeline Impact Committee of the Alaska State Legislature states: "The proposed North Slope pipeline will traverse about 130 miles of State land, 640 of federal land, and about 30 miles of privately owned land. . . ." Although the author suggested and the Alaskan Senate considered creating a State leasing board which would lease or acquire easements on land belonging to the federal government and then in turn lease the land so acquired to private contractors (Senate Bill 294, 1972), the plan did not materialize.

In any event, given the obvious problems involved in assigning all-Alaska crews to specific State land locations along the line, the material effect of the statute is to require all-Alaska crews for the entire project.

7. *The Trans-Alaska Pipeline Authorization Act,* 43 U. S. C. § 1651 *et seq.*

recognized bargaining representative of its employees. By requiring Peabody-Miller to first hire and last terminate Alaska residents in preference to any other employees covered by a collective bargaining agreement,[8] the Alaska Hire law contravenes the paramount and most fundamental federal policy enunciated in the National Labor Relations Act:[9] the preservation and encouragement of free collective bargaining.[10]

It is now axiomatic that, in enacting the NLRA, Congress established a unified national labor policy and preempted the entire field of labor relations insofar as it affects interstate commerce. State law is completely inapplicable, except if compatible with federal labor policy. *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 457, 77 S. Ct. 912, 918 (1957). All that is left to the states to regulate in this area are activities of merely peripheral concern to the NLRA or conduct marked by violence and imminent threats to the public order. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 243, 79 S. Ct. 773, 779 (1959).

Without doubt, it is a primary corner-stone of national labor policy that employers and representatives of employees be afforded the fullest opportunity to collectively bargain over terms and conditions of employment free from government influence. This Court has not hesitated to strike down state action which conflicts with this policy:

8. The applicable regulations make it clear that the Alaska Hire Act applies to employment covered by collective bargaining agreements. 8 AAC 35.025, 35.042(2). One regulation, which provided that "[a] complaint from a resident subject to grievance procedures under a collective bargaining agreement will not be accepted until all grievance procedures have been exhausted", was repealed. 8 AAC 35.044(k).

9. 29 U. S. C. § 151 *et seq.*

10. Though Appellants were not in a position to raise the preemption issue below, we urge that the Court consider it. An affirmance of the decision below without reference to this issue would create serious conflicts among federal laws.

> ". . . [S]tate attempts to influence the substantive terms of collective-bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB: '[s]ince the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.'" *Lodge 76, International Association of Machinists* v. *Wisconsin Employment Relations Commission*, 427 U. S. 132, 153, 96 S. Ct. 2548, 2559 (1976), *citing Teamsters Union* v. *Oliver*, 358 U. S. 283, 296, 79 S. Ct. 297, 305 (1959).

See also Teamster Local 174 v. *Lucas Flour Company*, 369 U. S. 95, 104, 82 S. Ct. 571, 577 (1962).

The Alaska Hire law presents an almost paradigmatic example of state legislation at cross-purposes with the federal labor policy of encouraging free collective bargaining. By requiring employers to hire, terminate or lay off employees solely on the basis of residence, the Alaska Hire law literally precludes meaningful bargaining over some of the most important conditions of employment. Indeed, order of layoff is a term of employment of the most primary concern in collective bargaining and a topic which is "grist in the mills of the arbitrators."[11] There can be no question, therefore, that the focal point of federal labor policy would be frustrated were this statute permitted to stand.

In *Alaska* v. *International Union Local 302*, 393 U. S. 405, 89 S. Ct. 684 (1969), *rehearing denied* 393 U. S. 1112, 89 S. Ct. 858 (1969), *affirming Tyree* v. *Edwards*, 287 F. Supp. 589 (D. Alaska, 1968), this Court was presented with another Alaska statute similar in design and purpose to the Alaska Hire law which was challenged as violative of federal labor policy and the Supremacy Clause. There, the law in question (the "Local Autonomy Act") required that any labor organization having 100 or more members who were residents of Alaska had to charter and establish a local organization in Alaska, the purpose, as here, being to ease Alaska's unemployment prob-

11. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 584, 80 S. Ct. 1347, 1354 (1960).

lems by preventing alleged discrimination against residents of Alaska in job referrals. The Local Autonomy Act also provided that the Alaska Commissioner of Labor could exempt from this requirement any labor organization which "maintain[ed] local-hire preference provisions in all of its labor-management agreements in the state. . . ." 287 F. Supp. at 592. This Court, without opinion, affirmed the finding of the three-judge panel that the Local Autonomy Act violated federal labor policy by impermissibly interfering with the collective bargaining process:

> "We conclude that the statutes comprising the Local Autonomy Act, and regulations related thereto, clearly indicated a state purpose which invades a field pre-empted by Congress. Impermissibly, the Act interferes with the full freedom of workers to choose a bargaining agent and in the collective bargaining process . . . . Because of conflict with federal law and policy, both actual and potential, the Act, as amended, is therefore unconstitutional under the Supremacy Clause." 287 F. Supp. at 594.

It is submitted that the Alaska Hire law infringes, no less than the Local Autonomy Act, on an area exclusively reserved to the collective bargaining process. Accordingly, it is similarly violative of the Supremacy Clause.

III.

THE ALASKA HIRE LAW VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE I, § 8 BY PREVENTING QUALIFIED NON-RESIDENT PIPELINE WORKERS FROM MOVING INTO THE STATE FOR THE PURPOSE OF CONSTRUCTING A RESOURCE DISTRIBUTION SYSTEM SERVING A NATIONAL INTEREST.[12]

The commerce clause reserves exclusively to Congress the right to "regulate Commerce with foreign nations, and among

12. While no claim was advanced below that the Alaska Hire law violates the commerce clause of the United States Constitution, Article I, § 8, examination of this question is warranted in order to fully evaluate the constitutional viability of this state legislation.

the several States . . .". It was intended to insure that the United States be a single economic unit without restraints on interstate commercial activity. *See generally, H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U. S. 525, 532-539, 69 S. Ct. 657, 662-665 (1949). It is settled that the transportation of persons is "commerce" within the meaning of the commerce clause. *Edwards* v. *California*, 314 U. S. 160, 172, 62 S. Ct. 164 (1941). By restricting the movement into Alaska of qualified non-resident workers for the purpose of constructing a privately-funded distribution system to transport a vital resource across state lines, the Alaska Hire law therefore creates "precisely the sort of Balkanization which the Constitution was intended to prevent". *Douglas* v. *Seacoast Products, Inc.*, *supra*, 97 S. Ct. at 1752.

It is also clear that the "natural resource" or ownership exception used by the court below to overcome a privileges and immunities challenge does not begin to provide justification in a commerce clause scrutiny. Indeed, as the lower court acknowledged, as established by *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 43 S. Ct. 658 (1923) and *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 31 S. Ct. 564 (1911), Alaska could not lawfully condition the export of "its" oil upon prior satisfaction of the state's local needs, no matter how critical.

Similarly, the specified legislative purpose of the Alaska Hire law—to reduce chronic unemployment within the state[13] —while a matter of legitimate concern, may not justify the burden on interstate commerce created by restricting non-residents from working on the pipeline. This Court has in a number of cases struck down as violative of the commerce clause state statutes and regulations which have attempted to promote local employment by requiring that private employers perform certain work within the state's jurisdiction.[14] Indeed

13. AS 38.40.020.

14. *See Toomer* v. *Witsell*, *supra*, holding unconstitutional a South Carolina statute requiring all shrimp boats in the state's waters

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this Court has indicated that, despite the legitimate local interest, statutes whose express or concealed purpose is to preserve or secure employment for the home state create a "particular burden on commerce [which is] virtually *per se* illegal." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 145, 90 S. Ct. 844, 849 (1970). The Alaska Hire law pursues the same ends, *i.e.*, promotion of local employment; its means are even more inherently discriminatory.[15]

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to dock at a state port to unload and pack their catches; *Polar Ice Cream and Creamery Co.* v. *Andrews*, 375 U. S. 361, 84 S. Ct. 387 (1963), holding unconstitutional Florida regulations which required Florida milk processors to accept their total supply of Class I milk from designated state producers at a fixed price; and *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 49 S. Ct. 1 (1928) striking down a Louisiana statute requiring that shrimp taken in state waters be processed in the state prior to shipment. *See also Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 497 (1934).

15. *In Brown* v. *Anderson*, *supra*, 202 F. Supp. at 103, a three-judge panel of the Federal District Court of Alaska struck down on the basis, *inter alia*, of the commerce clause Alaska legislation designed to temporarily restrict the entry of non-resident fishermen into certain fishing areas in order to prevent possible destitution of residents in those areas. Citing *Edwards* v. *California*, *supra*, the panel concluded:

> ". . . It has been held, as defendants point out, that the actual taking of fish is a local activity . . . But that is only one step in the whole process resulting in the shipment of the finished canned product.
>
> "A substantial number of fishermen are from States other than Alaska. They move in 'interstate commerce' as that term has been defined. The provisions of Chapter 62 do not prevent, but restrict that movement. Its provisions do place a burden on the movement in interstate commerce of nonresident fishermen, who must of necessity be transported annually.
>
> . . . .
>
> "We hold that Ch. 62, SLA 1961 violates Article I, § 8, Cl. 3 of the Constitution." *Id.*

It is submitted that this reasoning is eminently applicable to the case at bar.

The foregoing authority points to the inescapable conclusion that the Alaska Hire law cannot be reconciled with the concept of federalism which the commerce clause was designed to preserve. If Alaska can reserve to its residents all employment arising from utilization of its natural resources, there would be nothing preventing every state in the Union from doing the same. Each state, on the grounds of local economic or social problems such as unemployment or destitution, could close its doors to citizens of other states seeking employment in resource-related industries such as agriculture, fishing, mining and lumber, as well as processing, manufacturing or distribution industries related thereto. The effect would be to reduce the nation into separate economic enclaves and all but destroy the fabric binding the states into a single economic unit.

IV.

THE ALASKA HIRE LAW VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY SUBJECTING PEABODY-MILLER TO ARBITRARY AND DISCRIMINATORY REGULATION WHICH INTERFERES WITH ITS ORDINARY AND LAWFUL BUSINESS OPERATIONS.

While joining Appellants in urging reversal on the grounds that the Alaska Hire law unlawfully discriminates against non-residents of the State of Alaska, Peabody-Miller submits that this legislation impermissibly discriminates against employers of non-residents in violation of the equal protection clause by subjecting them to extremely heavy penalties solely because of such employment relationship.[16]

As already noted, benefiting the economic interests of residents is not a permissible state purpose which may avoid the

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16. Business corporations such as Peabody-Miller, although not citizens, are "persons" and thus entitled to equal protection of the laws under the Fourteenth Amendment. *Grosjean* v. *American Press Co.*, *supra*.

strictures of the privileges and immunities clause, even when the legislation is motivated by severe local unemployment problems. Moreover, as the Alaska Supreme Court previously recognized, legislation aimed at increasing the number of jobs available to Alaskans via exclusion of non-residents violates the equal protection clause as well:

> "A discrimination between residents and nonresidents based solely on the object of assisting the one class over the other economically cannot be upheld under either the privileges and immunities or equal protection clauses. While the former applies to 'citizens' and the latter to 'persons', both are aimed at preventing invidious discrimination." *Lynden Transport Inc. v. Alaska*, 532 P. 2d 700, 710 (Alaska, 1975).[17]

Finally, recent decisions of this Court indicate that state legislation penalizing employers for employing aliens on projects funded by the state clearly violates the equal protection clause. *Lefkowitz v. C. D. R. Enterprises, supra; Sugarman v. Dougall, supra; Graham v. Richardson, supra.* It would be anomalous indeed if a state statute penalizing employers who hire non-resident United States citizens on privately funded projects of national scope were allowed to stand.

17. *See also Brown v. Anderson, supra*, at 102; *Edwards v. Leaver*, 102 F. Supp. 698 (D. R. I. 1952) (striking down on the basis of the equal protection clause a state statute restricting licensing for commercial fishing to corporations 51% of whose stock was owned by legal residents and providing heavy penalties for violations).

CONCLUSION.

It is submitted that the Alaska Hire law and regulations promulgated thereunder are unconstitutional in that they violate the privileges and immunities, supremacy, commerce and equal protection clauses of the United States Constitution.

The decision below, insofar as it upholds the Alaska Hire law, should therefore be reversed.

Respectfully submitted,

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